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NO. ____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JAMES SECREST,

Appellant,

v.

STATE OF SOUTH DAKOTA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF SOUTH DAKOTA

MOTION TO DISMISS

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COMES NOW the Appellee and hereby moves the Court to dismiss the appeal herein from the

judgment of the Supreme Court of South Dakota on the ground that no substantial federal question is involved.

I

THE CONSTITUTIONAL PROVISION, STATE STATUTES INVOLVED AND THE NATURE OF THE CASE.

A. THE STATE STATUTES AND CONSTITUTIONAL PROVISION.

This appeal raises the question whether the prosecution of an individual for third degree burglary under SDCL 22-32-8, instead of under SDCL 22-32-16 for unlawful entry, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

SDCL 22-32-8 provides as follows:

> Any person who enters or remains in an unoccupied structure, with intent to commit any crime therein, is guilty of third degree burglary. Third degree burglary is a Class 4 felony.

SDCL 22-32-16 provides that:

> Any person who, under circumstances not amounting to burglary, enters a structure with intent to commit any crime, is guilty of a Class 1 misdemeanor.

Section 1 of the Fourteenth Amendment to the United States Constitution provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. PROCEEDINGS BELOW.

On June 4, 1981, Informations charging the Appellant with third degree burglary and with being an habitual offender, were filed with the Circuit Court of the Second Judicial Circuit, Minnehaha County, South Dakota. The Appellant was tried and found guilty by a jury in the circuit court on September 16, 1981, of burglary in the third degree and, on the following day, trial was had to the court on the habitual offender charge. The Circuit Court found Appellant guilty of being an habitual offender and

sentenced him to 25 years imprisonment at the South Dakota State Penitentiary.

The Appellant appealed his third degree burglary conviction to the South Dakota Supreme Court and that Court, on March 30, 1983, affirmed the Circuit Court's decision. The opinion of the South Dakota Supreme Court is State of South Dakota v. James Secrest, 331 N.W.2d 580 (S.D. 1983).

C. STATEMENT OF FACTS.

During the late night hours of May 8, 1981, the Army Surplus store in Sioux Falls, South Dakota, was burglarized. The Appellant was arrested and charged with third degree burglary, petty theft, and with being an habitual offender. The petty theft charge was dismissed upon the motion of the State's Attorney.

Appellant filed a pretrial motion to dismiss the information against him on the ground that the South Dakota burglary statutes are unconstitutional. Appellant claimed that the third degree

burglary statute, SDCL 22-32-8, violation of which is a felony, prohibited the identical conduct as that proscribed by SDCL 22-32-16, which sets out the elements of unlawful entry, a misdemeanor. Appellant claimed that his being charged under the third degree burglary statute violated his rights to equal protection and due process of law. The Circuit Court denied Appellant's motion, and his conviction and subsequent appeals to the Supreme Court of South Dakota and this Court followed.

II

THE CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

ARGUMENT

The Appellant's contention that South Dakota's third degree burglary statute, SDCL 22-32-8, and unlawful entry statute, SDCL 22-32-16, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because violation of the burglary

statute is a felony while violation under the other is a misdemeanor, has no merit.

The Appellant asserts that his constitutional right to equal protection of the law has been abridged by his being charged and convicted under South Dakota's third degree burglary statute. However, application of that statute to the Appellant implicated none of his constitutional rights.

The Equal Protection Clause of the Fourteenth Amendment prohibits selective enforcement of the criminal laws based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). The Appellant does not claim that he was prosecuted because of his membership in any racial, ethnic or religious group. He bases his equal protection argument on the fact that the prosecution decided to charge him with third degree burglary, a felony, instead of unlawful entry, a misdemeanor.

According to Appellant, both the third degree burglary and unlawful entry statutes proscribe identifical behavior and his being charged under the statute providing the harsher punishment violated Appellant's Fourteenth Amendment right to equal protection of the laws. The decisions of this Court indicate the lack of substance in Appellant's assertions.

This Court has long recognized that an individual whose conduct violates more than one criminal statute may be prosecuted under either statute, so long as no discrimation results to any class of defendants. United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755, 764 (1979); Oyler v. Boles, supra. Prosecutors have wide latitude, within constitutional limits, in deciding what charges, if any, to bring against an individual. United States v. Batchelder, supra; Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). "The conscious exercise of some selectivity in enforcement

is not in itself a federal constitutional violation so long as the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Bordenkircher v. Hayes, supra, 54 L.Ed.2d at 611, quoting Oyler v. Boles, supra, 7 L.Ed.2d at 453.

In addition, this Court has found no constitutional problems when overlapping criminal statutes are involved. United States v. Batchelder, supra. The decision to prosecute the Appellant under the burglary statute was within the discretion of the State's Attorney. Furthermore, Appellant's conduct was within that proscribed by the burglary statute and he makes no argument that he shouldn't have been charged with burglary. On the contrary, his contention is simply that to be charged with felony third degree burglary rather than misdemeanor unlawful entry results in the denial of equal protection. However, a defendant has no constitutional right

to choose which of two applicable statutes he will be indicted and prosecuted under, nor "is he entitled to choose the penalty scheme under which he will be sentenced." United States v. Batchelder, supra, 60 L.Ed.2d at 766. The Appellant offers no argument or evidence that others have engaged in acts similar to his, but were charged only with unlawful entry. He does not demonstrate the discriminatory, unequal treatment which is the basis for an equal protection challenge.

The lower federal courts and state courts have also rejected the contention that equal protection requires prosecution under the more lenient statute when two or more statutes prohibit similar conduct. See, e.g., United States v. Fern, 696 F.2d 1269 (11th Cir. 1983); United States v. Gordon, 548 F.2d 743 (8th Cir. 1977). South Dakota has recognized the great reach of

the Equal Protection Clause, State v. King, 82 S.D. 514, 149 N.W.2d 509 (1967), but, as this Court, has refused to reverse a conviction on the ". . . hypothetical contention that conceivably two persons under like circumstances could be charged with different offenses arising out of the same circumstances." State v. O'Connor, 86 S.D. 294, 300, 194 N.W.2d 246, 250 (1972).

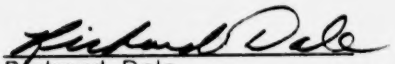
The Appellant has not shown any violation of his constitutional rights. The decision to charge the Appellant with third degree burglary was not motivated by a desire to discriminate against him, or for any other illegitimate reason. Nor does Appellant so argue. The State was constitutionally correct in charging Appellant with third degree burglary, a decision supported by the authorities cited above.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed.

Respectfully submitted,

MARK V. MEIERHENRY
ATTORNEY GENERAL



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UNITED STATES CONSTITUTION

AMENDMENT XIV

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBTS; ENFORCEMENT.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to the respective numbers, counting the whole number of

persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being 21 years of age, and citizens of the United States, or any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or is an officer of the

United States or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comform to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held to be illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

SDCL 22-32-8. Third degree burglary defined--Felony. Any person who enters or remains in an unoccupied structure, with intent to commit any crime therein, is guilty of third degree burglary. Third degree burglary is a Class 4 felony.

SDCL 22-32-16. Entry of structure to commit any crime as misdemeanor. Any person who, under circumstances not amounting to burglary, enters a structure with intent to commit any crime, is guilty of a Class 1 misdemeanor.